

ILLINOIS POLLUTION CONTROL BOARD

November 15, 2007

MIDWEST GENERATION EME, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB 04-185
)	(Trade Secret Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by A.S. Moore):

On October 25, 2007, petitioner, Midwest Generation EME, LLC (Midwest), and respondent, the Illinois Environmental Protection Agency (IEPA), filed a joint motion to stay this trade secret appeal until April 17, 2008. For the reasons below, the Board grants the motion. In this order, the Board provides background on the case before discussing and ruling on the joint motion.

BACKGROUND

On April 19, 2004, Midwest appealed a March 10, 2004 trade secret determination of IEPA under the Environmental Protection Act (Act) (415 ILCS 5 (2004)). The Board docketed the trade secret appeal as PCB 04-185 and, in a May 6, 2004 order, accepted the case for hearing. In the IEPA determination being appealed, IEPA denied Midwest's claim for trade secret protection of information that Midwest submitted to IEPA. IEPA made the determination after receiving Sierra Club's request, under Illinois' Freedom of Information Act (FOIA) (415 ILCS 140 (2006)), for a copy of Midwest's submittal.

Midwest maintains that the information it submitted to IEPA is entitled to trade secret status, exempt from public disclosure requirements under the Act. *See* 415 ILCS 5/7, 7.1 (2006). The information relates to Midwest's six coal-fired power stations, all of which are in Illinois. Midwest originally submitted the claimed information to the United States Environmental Protection Agency (USEPA) in response to USEPA's information request under Section 114 of the federal Clean Air Act (42 U.S.C. § 7414). Sierra Club also submitted a federal FOIA request to USEPA for the same claimed information. USEPA has been and is currently in the process of determining whether to exempt the materials claimed to be confidential business information from release under federal FOIA.

On May 20, 2004, IEPA filed the administrative record of its trade secret determination. On May 27, 2004, Sierra Club filed a motion to intervene in this trade secret appeal. IEPA supported Sierra Club's motion, but Midwest opposed intervention. On July 1, 2004, Midwest filed a motion for the Board to partially reconsider its May 6, 2004 order, asking the Board to

review IEPA's trade secret denial *de novo*. IEPA opposed Midwest's motion for partial reconsideration.

In a November 4, 2004 order, the Board denied Sierra Club's motion to intervene, but ruled that Sierra Club could participate in this proceeding through hearing statement, public comment, and *amicus curiae* briefing. In the same order, the Board denied Midwest's motion to partially reconsider, but held that Midwest may present new evidence at the Board hearing in specified circumstances. Additionally, while retaining jurisdiction, the Board ordered a limited remand to IEPA, directing IEPA to issue a supplemental decision stating IEPA's reasons for denying trade secret protection. The Board required Midwest to file a pleading responsive to IEPA's supplemental decision.

On November 30, 2004, the Office of the Attorney General for the State of Illinois, acting as counsel for IEPA, filed a "Clarification of Trade Secret Determination." On December 9, 2004, Midwest filed a "Motion to Strike the Attorney General's Clarification of IEPA's Trade Secret Determination." On January 11, 2005, IEPA filed its response to Midwest's motion to strike with the hearing officer's leave. On January 19, 2005, Midwest filed a motion for leave to file a reply to IEPA's response, attaching the reply.

On or about December 13, 2004, Midwest petitioned the Third District Appellate Court to review portions of the Board's November 4, 2004 order. In a January 20, 2005 order, the Board stayed the trade secret proceeding before the Board until the Third District Appellate Court disposed of Midwest's appeal or the Board ordered otherwise. On March 4, 2005, the court dismissed Midwest's appeal, granting the Board's motion to dismiss the appeal for lack of jurisdiction.

In an April 6, 2006 order, the Board ruled on Midwest's first motion to stay this appeal based on the pending USEPA determination of confidentiality. Midwest sought to stay this proceeding before the Board until the USEPA process concluded. IEPA opposed the motion. The Board issued a short-term stay, staying this proceeding for 120 days or until August 4, 2006. On August 3, 2006, Midwest filed an agreed motion to extend the original stay through December 4, 2006. The Board granted the agreed motion in an order of August 17, 2006.

Midwest filed a motion to further extend the stay on December 11, 2006. On December 19, 2006, IEPA filed a response opposing Midwest's motion. The Board denied Midwest's motion by order of February 15, 2007.

With the February 15, 2007 denial of stay extension, the Board, on April 19, 2007, granted Midwest's motion to strike portions of IEPA's supplemental determination as delineated in the Board order of April 19, 2007. Consistent with the Board's November 4, 2004 order, the Board's April 19, 2007 order required Midwest to file, within 30 days, a pleading responsive to IEPA's supplemental determination, as amended by the Board's April 19, 2007 order.

On May 22, 2007, the hearing officer issued an order accepting the parties' proposed discovery schedule as follows:

Initial interrogatories and document requests (limited to 25 of each, including subparts) must be served on or before August 17, 2007. Responses to initial interrogatories and document requests must be served on or before September 17, 2007. Depositions must be completed on or before December 17, 2007. Final interrogatories and document requests (limited to 15 each, including subparts) must be served on or before January 17, 2008. Responses to final interrogatories and document requests must be served on or before February 29, 2008. Supplementation or amendments of prior discovery responses must be served on or before March 14, 2008. Pre-hearing disclosure of the respective parties' list of exhibits and witnesses and their list of stipulated facts must be filed on or before April 11, 2008. Supplemental discovery closes on June 27, 2008. Dispositive motions and motions in limine must be filed on or before August 1, 2008. Hearing Officer Order, PCB 04-185, at 1 (May 22, 2007).

On May 29, 2007, Midwest filed its amended petition for review. The next day, Midwest filed a notice of substitution of an exhibit to its amended petition. In light of today's ruling on the joint motion for stay, the Board does not address these pleadings at this time.

On September 27, 2007, the hearing officer issued an order noting that, according to the parties, discovery is proceeding as scheduled.

As stated above, on October 25, 2007, Midwest and IEPA filed a joint motion to stay this proceeding until April 17, 2008. Accompanying the joint motion is a status report from Midwest, as well as Midwest's waiver to September 20, 2008, of the Board's deadline for deciding this appeal. The Board meeting before that deadline is currently scheduled for September 18, 2008. The case has not been to hearing, but as noted above is in discovery.

The Board today, in separate orders, is likewise granting joint motions for stays in two other trade secret appeals involving claimed information that is also the subject of a confidentiality request pending before USEPA: Commonwealth Edison Company v. IEPA, PCB 04-215; and Midwest Generation EME, LLC v. IEPA, PCB 04-216.

DISCUSSION

According to the joint motion, USEPA is evaluating whether the "very documents at issue" in Midwest's trade secret appeal before the Board "are entitled to confidential treatment under the federal Freedom of Information Act, 5 U.S.C. § 442." Joint Mot. at 1. Midwest was recently advised that USEPA has submitted Midwest's claimed information to "an independent contractor for review in connection with [USEPA's] FOIA determination." *Id.* at 2. Attached as an exhibit to the joint motion is a letter, dated September 11, 2007, to Midwest from Mark J. Polermo, Associate Regional Counsel with USEPA Region 5. The USEPA letter states in part:

This letter is to notify you that U.S. EPA will be disclosing Midwest Generation's documents provided in response to the Section 114 [of the federal Clean Air Act] information requests to its contractor, Industrial Economics, Inc., for the purpose of assisting U.S. EPA in the confidentiality determination. The contract number is EP-w06-065. *Id.*, Exh. B.

The joint motion then states: “Accordingly, the parties jointly move the Board to stay PCB 04-185 for a period of six months.” Joint Mot. at 2. According to the parties, the Board and USEPA are simultaneously engaged in proceedings involving the same “party in interest” (Midwest), the same “FOIA requestor” (Sierra Club), and a “substantially similar determination” of confidentiality with respect to the same claimed material. *Id.* Midwest and IEPA maintain that granting their requested stay would:

(1) avoid the costly and inefficient allocation of resources that is necessarily resulting from duplicative proceedings; (2) avoid practical difficulties that might arise from contrary FOIA determinations by state and federal agencies; and (3) allow the Board to be informed by a closely related federal determination. *Id.*

The parties assert that the factors supporting the Board’s prior issuance of a stay “have renewed force today.” Joint Mot. at 2. The joint motion explains that the parties are “poised to engage in expensive and time-consuming expert discovery and motion practice as the hearing in this matter approaches.” *Id.* Midwest and IEPA therefore “request that this case be stayed for six months until April 17, 2008.” *Id.*

The Board notes that Section 101.514(a) of its procedural rules addresses motions for stays:

Motions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed, and in decision deadline proceedings, by a waiver of any decision deadline. A status report detailing the progress of the proceeding must be included in the motion. (See also Section 101.308 of this Part.) 35 Ill. Adm. Code 101.514(a).

The decision to grant or deny a motion for stay is “vested in the sound discretion of the Board.” See People v. State Oil Co., PCB 97-103 (May 15, 2003), *aff’d sub nom State Oil Co. v. PCB*, 822 N.E.2d 876 (2nd Dist. 2004). When exercising its discretion to determine whether an arguably related matter pending elsewhere warrants staying a Board proceeding, the Board may consider the following factors: (1) comity; (2) prevention of multiplicity, vexation, and harassment; (3) likelihood of obtaining complete relief in the foreign jurisdiction; and (4) the *res judicata* effect of a foreign judgment in the local forum, *i.e.*, in the Board proceeding. See A. E. Staley Mfg. Co. v. Swift & Co., 84 Ill. 2d 245, 254, 419 N.E.2d 23, 27-28 (1980); see also Environmental Site Developers v. White & Brewer Trucking, Inc.; People v. White & Brewer Trucking, Inc., PCB 96-180, PCB 97-11 (July 10, 1997) (applying the Illinois Supreme Court’s A.E. Staley factors). The Board may also weigh the prejudice to the nonmovant from staying the proceeding against the policy of avoiding duplicative litigation. See Village of Mapleton v. Cathy’s Tap, Inc., 313 Ill. App. 3d 264, 267, 729 N.E.2d 854, 857 (3rd Dist. 2000).

Both parties presently want to stay this proceeding until April 17, 2008. The Board finds that the requested stay will serve the purposes articulated by the parties, as set forth above. The Board places considerable weight on the fact that, for the first time, the Board has been presented with USEPA documentation concerning the federal agency’s on-going confidentiality review

process, and the fact that IEPA has joined in this motion for stay. The Board also emphasizes that the stay would last to a date-certain in the near future, and that the parties have made progress in litigating this appeal since the Board denied the contested stay extension request on February 15, 2007. In addition, the FOIA requestor, Sierra Club, has not sought to oppose the joint motion for stay, and Midwest has waived the Board's decision deadline to September 20, 2008.

Further, the parties' claims of impending discovery costs and time commitments are substantiated by the hearing officer's order of May 22, 2007. That order set deadlines scheduled to take place before the joint motion's proposed stay termination date of April 17, 2008. Under the hearing officer order, absent a stay, depositions must be completed on or before December 17, 2007; final interrogatories and document requests must be served on or before January 17, 2008; responses to final interrogatories and document requests must be served on or before February 29, 2008; and the pre-hearing disclosure of the respective parties' list of exhibits and witnesses and their list of stipulated facts must be filed on or before April 11, 2008. *See* Hearing Officer Order, PCB 04-185, at 1 (May 22, 2007).

Under these circumstances, and considering all of the relevant factors, the Board finds that the requested stay extension is appropriate. Accordingly, the Board grants the joint motion, staying this appeal through April 17, 2008, unless the Board by order ends the stay sooner. The Board again stresses, however, that it is "mindful of the strong policy interest, evidenced in the Act, favoring public disclosure of environmental compliance information, particularly emission data. *See* 415 ILCS 5/7(b)-(d) (2004)." Midwest Generation, PCB 04-185 (Apr. 6, 2006). The Board therefore cautions the parties that in the future, absent especially compelling circumstances, the Board may be disinclined to extend the stay.

CONCLUSION

The Board grants the joint motion of Midwest and IEPA to stay this trade secret appeal. The stay is accordingly in effect through April 17, 2008, unless the Board issues an order terminating the stay earlier. If, during the stay, USEPA issues a final confidentiality determination concerning Midwest's claimed information, Midwest must promptly file with the Board a copy of USEPA's determination. As necessary, Midwest may make the filing consistent with the procedures of 35 Ill. Adm. Code 130 for protecting information from disclosure.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 15, 2007, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board